IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

PETITION FOR REHEARING

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

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PETITION FOR REHEARING

INTRODUCTION

On December 16, 1974, this Court issued an Order denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above case. Pursuant to this Court's Rule 58(2), Petitioners hereby petition the Court for a rehearing on the grounds that under the unequivocal decisions of this

Court the Court of Appeals should have abstained from deciding unsettled questions of state law having to do with the internal affairs of a state and particularly those dealing with the relationship of a state to one of its cities. The *mandatory* doctrine of abstention applicable to city-state relationships has not been previously presented to this Court, but seems clearly applicable inasmuch as the decision of the Court of Appeals below is based *solely* upon (1) previously uninterpreted statutes of the State of Texas dealing with its internal regulatory schemes for air carriers and airports and (2) the relationship under these statutes of the state to the cities of Dallas and Ft. Worth.

Such substantial grounds should be given full consideration by the Court upon a petition for rehearing. "The right to such a consideration is not to be deemed an empty formality as though such petition will as a matter of course be denied." *Flynn v. United States*, 75 S. Ct. 285, 286 (Opinion of Frankfurter, J., in chambers).

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 16, 1974, and (2) granting the petition.

GROUNDS FOR REHEARING

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, this Court clearly established the principle that federal courts cannot authoritatively determine the unsettled law of a state, and held that the last word upon the meaning of a state statute belongs to the

courts of the state. Referring to the decision of a three-judge district court with respect to a Texas statute, the Court said (312 U.S. at 499-500):

> "Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. *But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor the the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. Glenn v. Field Packing Co.* 290 U.S. 177; *Lee v. Bickell,* 292 U.S. 415. *The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.* The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." (emphasis added)

Since the *Pullman* case the abstention doctrine has been amplified and applied in many cases by this Court and the lower federal courts. The doctrine does not apply to every state law issue raised in a federal court, but this Court has fashioned a number of guidelines for determining when the doctrine should be applied and the instant case falls within virtually every guideline adopted by the Court.

A class of cases to which the doctrine uniformly has been applied are cases involving the administration of a

state's internal affairs, including its regulatory schemes. In these cases this Court specifically has focused upon the undesirability of the federal courts intruding into matters of a state's administration of its own procedures. Professor Wright refers to this as a second abstention doctrine:

> "A second abstention doctrine is that a federal court should refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. Thus it is not to issue declaratory judgments as to state taxes, nor interfere with a large-scale highway program simply to protect a landowner's right to compensation, nor take jurisdiction in a receivership proceeding where the state has a comprehensive procedure for liquidation of corporations of the sort involved." Wright, *Handbook of the Law of Federal Courts*, 199-200, Section 52 (2d ed. 1970)

In particular, the Court has pointed out that federal courts should not decide questions of relationships between a state and its cities. And in such cases this Court has not only sanctioned discretionary abstention; it has affirmatively required it, *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, thus establishing a *mandatory* doctrine of abstention in such cases.

One of the cases in this category is directly in point here. In *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, questions were raised as to the proper interpretation of a city ordinance and as to whether the city ordinance conflicted with a state statute. Virtually the identical questions are presented in this case with respect to the proper interpretation of a certificate and order issued by the Texas Aeronautics Commission

(TAC) and the supposed conflict between the certificate and order and the provision of the 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth closing Love Field to scheduled flights. The Court of Appeals based its decision *solely* on the supposed conflict between the actions of the TAC and the cities. As the TAC said on page 12 of its brief before this Court, "It is to the distribution of authority between municipality and state that the opinion of the Court [Fifth Circuit] was addressed . . . ."

In *Fieldcrest* this Court said:

> "We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. *Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act.* The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois.
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> * * *
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> "Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State.
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> * * *
>
> "The delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' (*Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50) re-emphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals.
>
> * * *

"... discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed." 316 U.S. at 171-172 (emphasis added).

In the *Thibodaux* case, 360 U.S. 25, *supra*, the Court reaffirmed the principles of the *Fieldcrest* case and made clear that it had *required* abstention, not merely sanctioned it, in appropriate cases. There the Court said:

"*But where the issue touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, *or involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality, Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, *we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.*

* * *

"In providing on his own motion for a stay in this case, *an experienced district judge was responding in a sensible way to a quandary* about the power of the City of Thibodaux *into which he was placed by an opinion of the Attorney General of Louisiana in which it was concluded that in a strikingly similar case a Louisiana city did not have the power here claimed by the City. A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted*, in respect to a situation like that before the judge, *by the Louisiana courts* and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it.

> whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." 360 U.S. at 27-30 (emphasis added).

The parallels with the instant case are striking. In the *Thibodaux* case the district court was faced with an uninterpreted state statute and an opinion of the state attorney general which appeared to be contrary to the language of the statute. Here the Court of Appeals was faced with a state statute (the Texas Aeronautics Commission Act) which has not been interpreted by the state courts and although its clear language gives the TAC no authority over municipally owned airports, such a power was said to be *implied* as a part of the TAC's power over the routes of intrastate air carriers. And the Texas Attorney General's office generally has supported this proposition, even though the Texas Municipal Airports Act specifically gives municipalities the right to determine the use of airports owned by them. Art 46d-7(a) Vernon's Annotated Texas Statutes.

The matter is far from clear, however, inasmuch as Southwest Airlines itself has urged, and the District Court found, in effect, that the federal Civil Aeronautics Board (CAB) has no such *implied* power over airports by virtue of its power over the routes of federally certificated air carriers and that "the TAC . . . is the CAB of Texas." (See page 9 of the Court's opinion in Civil Action No. CA3-5927-C and page 36 of Southwest's brief to the Court of Appeals for the Fifth Circuit.) If the CAB has no *implied* authority over airports by virtue of its power to regulate interstate carriers, the TAC has no such power over airports as a result of its power over intrastate carriers.

The interpretation of state law accepted by the Fifth Circuit Court of Appeals is therefore frought with inconsistencies and in any event "is nothing more than a forecast" of the law of Texas. Faced with these inconsistencies in the interpretation of state law *not previously interpreted by the state courts of Texas*, the District Court and the Fifth Circuit should have abstained from deciding these important questions dealing with the internal affairs of the State of Texas. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639; *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134; *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593.

As Professor Wright points out, "In Burford-type abstention, where the federal court defers to avoid interference with state activities, dismissal of the action, rather than retention of jurisdiction pending a state determination, is appropriate." Wright, *Handbook of the Law of Federal Courts* 200, Section 52 (2d ed. 1970). This procedure is particularly appropriate and necessary in Texas cases in view of the decisions of the Supreme Court of Texas in *United Services Life Insurance Company v. Delaney*, 396 S.W.2d 855, (Tex. 1965), and the Fifth Circuit Court of Appeals in *Barrett v. Atlantic Richfield Co.*, 444 F.2d 38 (5th Cir. 1971) and *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972).

In the *Delaney* case a split Supreme Court of Texas concluded that the courts of Texas could not render decisions or opinions on questions of state law, pursuant to an abstention order of the federal courts, when the federal court retains jurisdiction to finally decide the case. The court concluded that under such circumstances the Texas courts were being called upon

to render an advisory opinion and that the Texas courts have no power to render such opinions under the state constitution. 396 S.W. 2d at 863.

In the *Barrett* case the Fifth Circuit dealt extensively with the problem created by the *Delaney* case with respect to abstention in Texas cases and concluded that in Texas cases the proper procedure is for the district court to dismiss the case, without prejudice, so that a final and binding judgment can be rendered in the state court. 444 F.2d at 46. The Fifth Circuit reaffirmed this Texas procedure in the recent case of *Romero v. Coldwell, supra*, 455 F.2d at 1167.

In view of the above, there can be no doubt that this case falls clearly within the class of cases to which this Court's mandatory doctrine of abstention applies and that under this doctrine, as applied by the Fifth Circuit in Texas cases, the case should be dismissed without prejudice. Accordingly, this Court should rehear the case, grant certiorari and order dismissal of the case without prejudice so that the state law issues may be decided authoritatively by the courts of Texas.

There is no doubt that these issues will be decided authoritatively by the state courts in one or more cases now pending inasmuch as there are two cases pending in which the same issues are raised. In the case of *Texas International Airlines, Inc. v. The Dallas-Ft. Worth Regional Airport Board, et al*, Case No. 227349 in the District Court of Travis County, Texas, 200th Judicial District, filed December 12, 1974, the exact issues decided by the Fifth Circuit are in issue. In that case the cities of Dallas and Ft. Worth, as well as Southwest Airlines Co. and other airlines serving Dallas-Ft. Worth, are named as defendants, along with the TAC. The case

promises to result in an authoritative decision by the state courts of Texas and includes all of the parties with an interest in the matter. Moreover, there is another case, *Southwest Airlines Co. v. The City of Dallas*, Case No. 74-3178-J in the District Court for Dallas County, Texas, 191st Judicial District, in which Southwest Airlines itself has raised the same issues which were decided by the Fifth Circuit. Certified copies of the complaints in these cases will be provided upon request of this Court.

The pendency of the state court actions between the same parties, raising the same issues, is another compelling reason for this Court to invoke the abstention doctrine. See *Chicago v. Fielderest Dairies, Inc., supra*, 316 U.S. at 173, where this Court said:

> "The desirability of the course which we have suggested is not embarrassed by any question as to whether ready recourse may be had to the state courts. The availability of the state tribunal is obvious, since a case involving substantially identical issues and brought by respondent's parent corporation is pending in state court."

See also Davis v. Mann, 377 U.S. 678; *Kaiser Steel Corp. v. W.S. Ranch Co., supra*, 391 U.S. at 594; *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949); *P. Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951).

Finally, as Wright says at page 200 of his work on the federal courts, "If the state court to which deference is thus shown prejudices any federal rights of the parties, this can be redressed by review of the state decision in the United States Supreme Court." Thus dismissal of the case will leave the state courts free to

determine the entire controversy, with the right to review decisions of any related federal questions being vested in this court.

CONCLUSION

Petitioners submit that the decisions of this Court with respect to abstention in cases such as the instant case call for a rehearing of this case, for the grant of a writ of certiorari and for an order remanding the case to the Fifth Circuit Court of Appeals with direction that the case be dismissed without prejudice. Otherwise, needless friction will be created between the state and federal courts and the decision of the Fifth Circuit may be embarrassed by a conflicting and controlling decision of the state courts of Texas.

For these reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and

opinion below, or remand the case to the Court of Appeals for the Fifth Circuit with direction that the case be dismissed without prejudice.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

The undersigned counsel for the petitioners in the above case hereby certifies, pursuant to Rule 58 of this Court's Rules, that the Petition for Rehearing of Denial of a Writ of Certiorari filed concurrently herewith is presented in good faith and not for the purpose of delay. The undersigned counsel further certifies that the said petition is restricted to substantial grounds available to the petitioners although not previously presented.

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

By _____